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**STATEMENT**

**OF**

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**REGARDING A HEARING ON**

**“CROSSING THE BORDER: IMMIGRANTS IN DETENTION AND  
VICTIMS OF TRAFFICKING”**

**BEFORE THE**

**HOUSE COMMITTEE ON HOMELAND SECURITY  
SUBCOMMITTEE ON BORDER, MARITIME and GLOBAL  
COUNTERTERRORISM  
U.S. HOUSE OF REPRESENTATIVES**

**MARCH 20, 2007**

## **Introduction:**

Good afternoon, Madame Chair, Ranking Member Souder, and distinguished Members of the Subcommittee. It is my privilege to appear before you to discuss the critical role of detention in our Nation's immigration policy, particularly as it pertains to human trafficking. My name is Victor X. Cerda, and I am a founding partner of the law firm Siff & Cerda LLP in Washington with a practice focused on immigration law and homeland security. Prior to this, I served for 10-years with the legacy Immigration and Naturalization Service and the recently created U.S. Immigration and Customs Enforcement (ICE), holding various titles including Chief of Staff and General Counsel. Prior to my departure in 2005, I was the Acting Director of Detention and Removal Operations (DRO).

First, I would like to acknowledge the efforts of the men and women of ICE DRO who I personally believe have the most challenging mission in immigration. They are responsible for the apprehension, detention, and physical removal of individuals ordered deported. They must be effective in their mission in order to support our national security, protect the community from criminal aliens, and maintain the integrity of our immigration system. They are the funnel point for almost all of the removal cases in our immigration system, and are responsible for concluding the proceedings in instances where a removal order is issued. At the same time, recognizing our rich tradition as a Nation of immigrants, they must perform their duties in a manner that recognizes the importance of treating those in their care in a humane manner. It was a privilege and a learning experience to have worked with them during my government career.

I would like to share my perspective on why I believe detention is a critical and necessary factor in our Nation's attempt to enhance our immigration processes. Before explaining the underpinnings of these thoughts, I would like to highlight a case that exemplifies in my opinion the complexity of the challenge we face in evaluating our immigration system and the role of detention for immigration purposes. In 2004, a sympathetic story on the detention of a Buddhist "nun" fleeing persecution from China was prominently displayed on the front page of the Washington Post. Understandably, the story caused a significant outcry from the public and some members of Congress. Adding to the concerns was the fact that she had been granted asylum by a judge, a decision that was under appeal by ICE while the "nun" remained in custody. Ultimately, ICE decided that she should be released while the appeal was pending, as the immigration judge had made a credibility finding on her identity and her claim of persecution. At the same time, an ICE investigation was ongoing regarding her claim and identity. After her release, ICE's investigation determined that her claim was completely fraudulent and that she was not in fact a nun. She was arrested and charged with fraud and eventually pled guilty in district court, admitting she was not a nun. The issues of this case reflect those seen in hundreds of immigration cases in the country each day. Unfortunately, immigration issues and cases do not always lend themselves to a black and white distinction, despite prominent articles in the press.

## **The Need for Detention in the Immigration Process:**

Fortunately, the case of the purported nun did not involve a national security threat. It did however highlight the national security vulnerabilities and issues of fraud in our immigration system, in this instance our asylum system. Unfortunately, we as a Nation have witnessed the potential deadly consequences of these vulnerabilities as they were exploited by individuals seeking to harm our Nation. Indeed, we should not forget the fact that 9/11 did not mark the first time the Twin Towers were subject to a terrorist attack. It was two asylum seekers who were released while their claims were pending – Ramzi Yousef and Sheik Rahman – who successfully carried out an attack on the World Trade Center in February 1993. Other past examples of terrorists exploiting vulnerabilities in our immigration system include Aimal Kasi’s killing of CIA employees outside of Langley in 1993 and Abu Mezer’s almost successful plot to bomb New York City subways in 1997 - both had claimed asylum in the U.S. These costly lessons serve as a strong argument on the important role detention plays in the immigration context, even with respect to asylum seekers.

In addition to national security concerns, the need for detention is clearly spelled out in our abysmal 85-90% absconder rate that our immigration system experiences. These numbers make clear that the “honor system” that we heavily relied upon in the past did not work. As a result, we face a fugitive alien population of over 500,000 individuals that without drastic change in our strategy will continue to mushroom at a rate of over 40,000 new fugitives per year. We can all confidently conclude that something has gone awry. Detention has been the only proven guarantee for compliance with detention orders.

Properly, ICE is aggressively exploring alternatives to detention in hopes of identifying a medium ground aside from outright release or detention that actually is effective in addressing the lack of respect for judicial hearings and orders of removal. Initial results appear positive and perhaps some will become more permanent mechanisms for addressing bona fide asylum seekers and victims of trafficking. However, the fact that our current laws treat fugitives who willfully disregard an order of removal the same as an individual who does in fact comply with a removal order may prove the undoing of any alternative to detention aimed at enhancing compliance with removal orders. It will be interesting to see the effects of these alternatives on compliance with removal orders. In the meantime, however, it is difficult to fault ICE’s reliance on detention in its attempts to gain control over our borders and to enhance the integrity of our immigration system. Catch and return is a positive step forward in this goal.

### **The Need for Detention Standards and Their Effective Implementation:**

While detention in my opinion is a necessary tool under the current statutes and immigration processes, there is still the need to treat all detainees with respect and dignity. That need is even more pronounced in the context of dealing with families, children, and trafficking victims. The detention standards that were initially established in collaboration with the American Bar Association in 2001 play a key role in ensuring that ICE’s detainees receive proper treatment and are afforded sufficient access and tools

to exercise their immigration rights. These 38 standards establish the conditions that are to apply nationally to all ICE detainees. These are supplemented by additional criteria that ICE establishes and that must be met before a facility or contractor is permitted to house ICE detainees. The promulgation of these standards was an achievement; however, implementation of these standards is an equally important mission that ICE must continually meet. Aside from DRO reviews, multiple levels of potential external agency review, ranging from the ABA, the United Nations, ICE Office of Professional Responsibility (OPR), DHS' Office of Civil Liberties and Civil Rights, DHS' Office of the Inspector General (OIG), and the General Accounting Office ensure compliance with detention standards and civil rights laws. All of these entities have authority to tour or audit these facilities and most have exercised this authority. The process is very open to review and has been for some time. Facilities housing ICE detainees undergo at least one yearly review for compliance, and allegations of mistreatment are referred to ICE OPR and the DHS OIG for investigation. Where standards are not being followed, action should be taken immediately to correct these deficiencies, and absent progress, the facilities should no longer be used. Similarly, DRO officers and contractors should be trained sufficiently on the standards and should be held to the highest standards when caring for detainees.

The unique factor surrounding families, children, and trafficking victims require additional care and consideration than the general population. Efforts to create family friendly environments should be pursued, as well as viable alternatives to detention that meet both the individual's and the government's needs. Training and efforts should be undertaken to ensure that the unique needs of this population are in fact recognized and understood by both ICE and its contractors. Intelligence and questioning should be utilized to identify genuine trafficking cases as well as genuine asylum seekers. That being said, I would have to express my disagreement with any view that would eliminate any type of detention for such populations.

### **The Need to Deter Life Threatening Border Crossings:**

Aside from my previously noted concerns regarding fraudulent immigration claims, protecting and deterring life-threatening border crossings by families is a factor supporting DHS' family detention strategy. DHS, in its efforts to control the border, faces sophisticated criminal smuggling organizations that will take any steps necessary to ensure their financial livelihood. Smugglers do not view their "clients" as human beings, but rather perceive them as potential profit if they succeed in not only getting them across the border, but doing so in a manner that does not lead to their detention. Smuggling organizations will adapt their strategies based on DHS' initiatives to secure our borders. In this light, the implementation of the Catch and Return policy posed a new DHS tactic that threatened smuggling organization's financial interests. As anticipated, these organizations evaluated all remaining options for successful smuggling. One of the initial loopholes identified by smuggling gangs involved the use of children and family units to avoid detention given DHS' past policy favoring release of families and adults with children, even after the expansion of expedited removal. As a result, there was an increase in the use of "rented" children and organizations encouraged individuals to bring

their family on the treacherous journey across the border, often through desert environments that pose a grave challenge to young male adults, let alone children.

When evaluating and considering the issue of children and families, the concept of deterrence must be considered. In light of smuggling organizations using children as decoys and encouraging individuals to bring their spouse and children on the treacherous border crossing, it is essential to deter these strategies in hopes of preventing harm and death to vulnerable individuals. DHS has no other recourse but to take the strongest tactic to discourage this practice and in all likelihood save the lives of numerous family members and minor children. To take any other approach in the interest of families that may be perceived by the smuggling organizations or desperate economic migrants as a “loophole” similar to the failed Catch and Release policy, may in fact induce deadly consequences. While it is understandable to question the policy and the conditions of confinement, I believe it is equally important to view the overall goal of deterring dangerous risks and avoiding the unnecessary loss of life.

### **Victims of Trafficking:**

While trafficking was not an area directly under my operational control while at ICE, I would like to take a moment to highlight some observations from my ICE experience on the human trafficking situation and organizations that prey on populations. ICE must continue to focus on identifying, criminally prosecuting and dismantling trafficking rings with the same strength and focus aimed at deterring smugglers from risking families in dangerous border crossings. It should be understood that DHS’ emphasis on border security does not come at the expense of trafficking investigations, as most trafficking organizations have exploited vulnerabilities in our porous border and our immigration system to move vulnerable populations including women and children into the U.S. for exploitation and profit. Trafficking of vulnerable populations has emerged as a lucrative global criminal industry and threatens not only the victims being trafficked, but also the communities in the United States that must deal with these ruthless and often violent organizations. I believe advances have been made in successfully dismantling these criminal organizations since ICE’s inception. ICE’s capabilities not only to criminally charge such organizations but also to attack their financial resources through asset forfeiture have been a positive result of the merging of customs and immigration expertise. Whereas immigration cases before would go “cold” and be treated as a minor immigration ring, the legacy custom’s capabilities in tracking assets and property across the Nation and internationally has proven a new invaluable tool against trafficking organizations. Congress has supported these efforts with resources and any support to continue and enhance these new techniques both at ICE and in the state and local community should continue.

While ICE utilizes its federal authorities in this mission, coordination and cooperation with state and local entities has proven extremely beneficial in the past. In fact, such coordination is almost essential. For example, simple arrests and investigations that may have initially been perceived as a local isolated incident involving a brothel have as a result of ICE and state or local taskforces resulted in the identification and

dismantling of national and international trafficking organizations. Clearly, within the goal of border security and control, the identification and elimination of such organizations should remain a priority within ICE.

Finally, similar to the context of dealing with families, efforts should be made to recognize the circumstances of genuine victims of trafficking and accommodations in the handling of their cases should be made, to include consideration of any benefits they may be entitled to, considerations on their housing or custody status, and consideration to their safety and protection from elements of the trafficking organizations that have preyed on them before. I believe the sensitivity involving victims of trafficking is understood at ICE and that efforts are made to address the unique needs of this population as any investigation or prosecution progresses.

### **Considerations Aside from Detention:**

While I perceive the use of detention as a necessary factor in our immigration system, I will close by highlighting other areas that should be considered. First, we should recognize that despite the challenge DHS faces in securing our borders, it does exercise prosecutorial discretion in the detention context numerous times every day across the country, particularly with respect to investigations involving victims of trafficking. The system in certain contexts affords this flexibility and it should continue to be used when appropriate. Second, we should continue to explore alternatives to detention in an attempt to identify a solution that objectively serves both the individual's interests and the government's interest in ensuring integrity in our immigration system. Finally, as you explore ways to reform the process, we may benefit by exploring the question of why it takes our Nation months if not years to come to a "yes" or "no" answer on whether an individual or family under our laws should be permitted to remain in our country or be deported? While detention may be necessary in many cases, the length of detention which is often determined by the legal and judicial processes is something that we control. Similarly, genuine victims of trafficking should be able to have their claims for benefits as such victims reviewed and adjudicated properly and efficiently. Judicial and attorney resources to eliminate backlogged court dockets and prolonged periods of judicial review are factors that should be considered in the scheme of comprehensive immigration reform. Adjudication resources should be committed to those seeking benefits as victims of trafficking. A prolonged and delayed process, caused by the currently overwhelmed judicial and legal systems does not benefit the genuine asylum seeker, victim of trafficking or the government. If detention is required, shortening any decision making process would decrease the burden on the government and benefit individuals as they exercise their rights under our immigration laws.

### **Conclusion:**

In conclusion, I applaud this Committee's effort to review our immigration processes and attempt to address the numerous flaws in our immigration system that we as a Nation have witnessed since the last major attempt to reform our immigration laws. To say the least, it is a challenging task at hand. Regardless, change is needed to help

improve the system so that our Nation's immigration laws and processes actually ensure our national security while preserving our rich tradition as a Nation of immigrants. Hopefully legislative efforts will be taken to this effect soon. Thank you again for the opportunity to appear before you today, and I would be pleased to answer any questions you may have.

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